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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1025

MRS. MARION T. SMITH, WHO SUES AS ADMINISTRATRIX OF THE ESTATE OF HER DAUGHTER, HELEN WALKER LaFEVER, *Petitioner,*

versus

HYDRO GAS COMPANY OF WEST FLORIDA, INC., A CORPORATION, QUINN W. STUART, MARION W. BAGWELL, BETTY S. GOLDSMITH AND MYRTLE BAGWELL, INDIVIDUALLY, AND DOING BUSINESS AS A PARTNERSHIP UNDER THE NAME AND STYLE OF GENERAL STEEL TANK COMPANY, AND GENERAL STEEL TANK COMPANY, AN ORGANIZATION WHOSE TRUE LEGAL ENTITY IS OTHERWISE UNKNOWN TO THE PLAINTIFF, ETC., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT HYDRO GAS COMPANY OF WEST FLORIDA, INC., IN OPPOSITION

OPINIONS BELOW

The judgment of the District Court (R. 38) was without opinion. The opinion of the Circuit Court of Appeals (R. 47) is reported in 157 Fed. (2d) 809.

JURISDICTION

Petitioner invokes the jurisdiction of this court under Section 240, as amended, of the Judicial Code (28 U. S. C. 347). The judgment sought to be reviewed was entered November 14, 1946 (R. 47).

QUESTIONS PRESENTED

Did the service of process sought to be had under the laws of Alabama on Hydro Gas Company of West Florida, Inc., give the United States Court for the Southern District of Alabama jurisdiction over its person?

If the preceding question is answered affirmatively, was the venue proper?

STATUTES INVOLVED

The pertinent statutes are set out in the Appendix, *infra*, pp. 13-17.

STATEMENT

None of the parties to this cause is a resident of the Southern District of Alabama, in which suit was filed. Petitioner, plaintiff and appellant below, resides in Pennsylvania. Respondent Hydro Gas Company of West Florida, Inc., hereinafter called Gas Company, is a Florida corporation. The cause of action did not arise in the Southern District of Alabama, but in the State of Florida, where Gas Company is presently engaged in business (R. 2).

In 1937, Gas Company had qualified to do business in Alabama and had appointed J. C. Beatty its statutory agent for the service of process. Prior to January 1, 1940, Gas Company disposed of all of its assets in Alabama and has not since done business in Alabama nor had any agent for the service of process in the state (R. 19, 24).

The averred cause of action arose in Florida on September 11, 1945, and suit was filed on January 3, 1946 (R. 9). Service was sought to be had on said Beatty, who had not been authorized to act as statutory agent of the Gas Company since prior to its withdrawal from Alabama before January 1, 1940 (R. 24). Being unable to locate Beatty, petitioner had process served on Miss Sibyl Pool, Secretary of State of Alabama, who resides beyond the limits of the Southern District of Alabama (R. 11, 26).

Gas Company never designated Miss Pool as its agent for the service of process and denies that it has had any such agent in Alabama since withdrawing from the state more than five (5) years before the averred cause of action arose (R. 26).

Gas Company duly interposed objections to the service of process, jurisdiction over the person, and venue (R. 14).

The District Court quashed the purported service of summons on Gas Company, and the return thereof, and dismissed the action against it, after finding:

> "And the court finding that since January 1, 1940, the defendant Hydro Gas Company of West Florida, Inc., a corporation organized and existing under the laws of the State of Florida, has not done business in the State of Alabama; or had in said State an agent upon whom process might be served; or been found in, or consented to be sued in, said State; or been a resident, citizen, or inhabitant of said State." (R., p. 38).

The Circuit Court of Appeals affirmed this judgment (R. 51).

ARGUMENT

Petitioner claims that the decision below is in probable conflict with the decision in *Neirbo Company v. Bethlehem Shipbuilding Corporation, Ltd.*, 308 U. S. 165, and that such decision is controlling (Br. 9). We submit that the cited case is inapposite factually and in legal effect. The factual differentiation is clear. In the *Neirbo* case the cause of action arose in the state where suit was brought, and in which the defendant was doing business at the time, and service was had on its duly designated agent in the district. Respondent Gas Company had not done business in Alabama for more than six (6) years before suit was filed; the cause of action arose in Florida more than five (5) years after Gas Company left Alabama and was not connected in any way with business at any time done by the Gas Company in Alabama; and service was not had on any person at any time designated by the Gas Company as its process agent, or within the district.

The legal question decided in the *Neirbo* case is as obviously dissimilar from that here presented. *Neirbo* held that *because*, under the New York law, the corporation had consented to be sued by appointing a resident agent to receive service of process, *it would be held* to have waived objections to venue. Manifestly, this decision did not endeavor to change the law of New York concerning service of process on foreign corporations or to fix new rules for obtaining jurisdiction over the person of such entities. The decision went to venue, and to venue only. *(Cf. Mississippi Publishing Corporation v. Murphree*, decided Jan. 2, 1946; 90 L. Ed. 207). As we shall see, the Alabama law, under which service of process in the case at bar was attempted, is that Gas Company has not consented to be sued in this cause, nor agreed that jurisdiction over its person may be obtained in the method pursued or in this cause. Therefore, the fundamental and essential requisite of the application of the *Neirbo* rule is absent. That deci-

sion may only be applied where the consent to suit and service of process is first found under the state law. The impossibility of such a finding under the law of Alabama, in the instant situation, is an insurmountable obstacle in petitioner's path. Absent jurisdiction of the person, obtained by adequate service of process, the question of venue does not arise.

It is apparent that petitioner wholly misconceives the *Neirbo* doctrine and relies on it to supply a consent which must be found, if at all, under the laws of Alabama, and which is not to be found thereunder.[1]

The Alabama rule is clear. Under it, a foreign corporation which has quit doing business in the state may not be served with process on a cause of action arising beyond Alabama, and will not be deemed to have consented, expressly or by implication, to suit thereon or service of process in connection therewith. This was the law of Alabama when the Gas Company qualified in the state, and when it withdrew from the state, and it is still the law of Alabama. If the Gas Company and the state made any "compact" or "contract", as petitioner claims, it was made

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[1] Petitioner's misconception of the *Neirbo* case pervades her brief. As petitioner's statement of the question here presented shows (Br. 5), she regards that decision as *establishing* a "consent to be sued". Instead, the *Neirbo* rule only becomes operative when the *state law* has established a "consent to be sued"; and the cited decision's effect is limited to holding that such consent, so established, amounts to a waiver of venue objections. Unlike petitioner, the lower Federal courts have experienced no difficulty in ascertaining that *Neirbo* does not change the applicable state statutes and decisions determining when and under what circumstances the foreign corporation will be held to have "consented to be sued". They have, therefore, refused to regard the *Neirbo* case as controlling where, even though the foreign corporation was doing business where sued and service is had on the designated process agent, the cause of action arose in another state and the state in which suit was brought did not require the corporation to consent to service of process on causes arising beyond its borders. *North Butte Mining Co. v. Tripp* (CCA, 9) 128 Fed. (2d) 588; *Knobloch v. M. W. Kellogg Co., et al.* (CCA, 5) 154 Fed. (2d) 45.

in accordance with the rule just stated. On this issue, the decision of the Supreme Court of Alabama in *Jefferson Island Salt Co. v. Longyear Co.*, 210 Ala. 352, 98 Sou. 119, is directly in point. In the cited case, suit was brought on a cause of action arising outside Alabama against a foreign corporation which had previously qualified to do business in Alabama but had ceased such business before suit was filed. Process was served on the individual who had been appointed the defendant's statutory agent and it was admitted that *this appointment had not been revoked at the time of service.*[2] The statutes upon which petitioner relies in the case at bar were then in effect.[3] The purpose of the provision contained in the Code of 1923 as Section 7209 was enunciated, on p. 355, as follows:

> "This statutory provision was intended to protect the citizens of the state as to causes of action arising within the state and to compel foreign corporations to submit themselves to its jurisdiction as a condition precedent to doing business and to use our courts for the enforcement of its rights and to, in effect, designate the county in which it would be suable and the agent upon whom process could be served. *Alabama Western R. R. v. Tally-Bates Co.*, 162 Ala. 402, 50 Sou. 341."

Proceeding, the court said that when the corporation complied with the foregoing statute, it impliedly submitted

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[2] Though petitioner appears to attach great importance to the failure of Gas Company to file an instrument formally signifying its withdrawal from the state and the revocation of its designated agent's authority, no Alabama statute is or can be cited requiring such action or prescribing the form or content of any such instrument. The *Jefferson Island* case, being discussed above, shows that the failure to file the same is wholly immaterial. The important fact, destroying jurisdiction, is the withdrawal from the state. *See: 33 Harv. L. Rev. 701.*

[3] Section 7209 of the Code of 1923 (now Section 192 of Title 10 of the Code of 1940) was Section 3642 of the Code of 1907. Section 9426 of the Code of 1923 (now supplanted by the Act of July 6, 1940) was Section 5306 of the Code of 1907. These statutes are set out in the Appendix hereto.

itself to the jurisdiction of the courts of this state upon the service of process on its designated agent, but that:

> "This implied assent, however, is confined to transactions or causes of action arising in this state and not those arising in other states. *Simon v. Sou. R. R.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492; *Old Wayne Association v. McDonough*, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345; *New York R. R. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292."

Apparently the plaintiff in the *Jefferson Island* case, just as petitioner in the case at bar, claimed that the Act of 1907, which now appears as Section 97, Title 7, Code of Alabama of 1940 (Appendix, p. 16), should cause a different result, because the court then considered said statute and noted that it allowed suits in Alabama covering causes of action arising in other states "if legal service can be had on the defendant". The court held, however, that, despite the Act of 1907, the designation of a process agent under the Alabama statute applies only to causes of action arising in Alabama and that, the corporation having ceased to do business in the state, effective service could not be had on a cause of action arising beyond the state.[4]

The Alabama rule is further exemplified by *Parker v. Central of Georgia Ry. Co.*, 233 Ala. 149, 170 Sou. 333, where there was no question "as to the sufficiency of the service to justify a personal judgment". The court ruled

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[4] The second part of the *Jefferson Island* decision, in which the court proceeded to consider whether the defendant was "doing business" in Jefferson County so as to be subject to personal service under the due process clause, need not now concern us. Parenthetically, it may be conceded that there is doubt that the rule of *Green v. Chicago, Burlington & Quincy Railway Co.*, 205 U. S. 530 (1907), relied on by the court, retains much vitality when considered in light of more recent expressions of the Supreme Court of the United States. *Cf., International Shoe Company v. Washington*, 326 U. S. 310. But regardless of whether or not solicitation of business amounts to "doing business", the first part of the Court's opinion in the *Jefferson Island* case remains unchanged, because the question was that of construing a state statute, a matter within the province of the court.

that a foreign corporation which admitted the efficacy of personal service may be sued in Alabama, after ceasing business therein, *if the cause of action arose in Alabama.* The *Jefferson Island* case is cited approvingly for the proposition that the rule is otherwise if the cause of action did not arise in the state.

We have demonstrated that if there were any "contract" between Gas Company and the State of Alabama, such contract excused the Gas Company from consenting to service of process or suit on any cause of action arising outside Alabama after it quit doing business therein, regardless of whether or not any formal instrument revoking the authority of its statutory agent was ever filed. But it should be pointed out, also, that the "contract" upon which petitioner relies, if it ever existed, was abrogated by the Legislature of the State of Alabama when it adopted the Act of July 6, 1940 (General Acts of Alabama, 1939, page 976, approved July 6, 1940, set out in the Appendix, p. 14). This statute supplanted Section 9426 of the Code of Alabama of 1923, on which petitioner relies, and provides the method now given by the laws of Alabama for obtaining service of process on foreign corporations. Petitioner cannot claim any "contract" between Gas Company and Alabama under the Act of July 6, 1940, because Gas Company had quit doing business in the state before the statute was enacted. So petitioner claims that the supplanted statute, Section 9426 of the Code of 1923, remains in effect for the purpose of the "contract". Thereby petitioner necessarily claims that service of process may be had under a statute which is no longer in effect in Alabama. To say the least, the argument is unusual.

The Act of July 6, 1940, obviously affords no basis for petitioner's contentions that effective service of process has been had. Amplifying the decision in *Parker v. Central of Georgia Ry. Co., supra,* it requires a foreign cor-

poration to remain subject to service of process "until the statutes of limitation shall have run against the bringing of action" against it. A reading of the statute makes it clear that the Legislature was concerned with the protection of its citizens in causes of action arising in Alabama. It did not intend to disturb in any respect the settled rules enunciated in the *Jefferson Island* case and the *Parker* case and open the door to litigation arising in distant states after the corporation withdrew from Alabama.

The Act of July 6, 1940, would not authorize service of process as here attempted even if it had been in effect while Gas Company was doing business in Alabama and even if the cause of action had arisen in Alabama. The limitation on actions for wrongful death under the laws of Alabama is two (2) years (Section 25, Title 7, Code of 1940, Appendix, p. 16), and had the accident involving plaintiff's intestate occurred while the Gas Company was doing business in Alabama, suit would have been barred long ago. This emphasizes the fallacy of petitioner's argument that the Alabama statutes should be construed to open the doors of courts in that state to litigation arising outside the state against a corporation no longer doing business in Alabama, when, had the cause of action arisen while the corporation was in the state, it would have been barred by the applicable limitation.

Petitioner constantly reiterates that the consent to be sued which confronted the court in the *Neirbo* case was an actual consent and not an implied consent. Our discussion has thus far considered the instant case as though the same were true here, and we have seen that, even so, any actual consent to be sued which may be spelled out of the qualification of Gas Company in Alabama does not go so far as to constitute consent to service of process on a cause of action arising beyond Alabama after the corporation's withdrawal from the state. In reality, however, no actual

consent of any kind may be found for the service of process here attempted. The Gas Company never designated Miss Sibyl Pool or any other Secretary of State of Alabama to act as its process agent (R. 26). Therefore, on this ground, if on no other, the case is distinguished from *Neirbo* and falls within the rule of *In re Keasbey and Mattison Co.*, 160 U. S. 221.

An examination of petitioner's brief discloses her inability to cite a single case in which a state statute has been construed as petitioner contends the Alabama statutes should be construed. On the other hand, in addition to the determinative decisions by the Alabama court in the *Jefferson Island* and *Parker* cases, *supra,* we find many other cases refusing to subject foreign corporations to litigation arising in another jurisdiction after it had withdrawn from the state. A case directly in point is *Chipman, Ltd. v. Thomas B. Jeffery Co.*, 251 U. S. 373, in which, as in the case at bar, the authority of the process agent had not been revoked in writing when the corporation left the state.* Other cases to the same effect include: *Mitchell Furniture Co. v. Selden Breck Construction Co.*, 257 U. S. 213; *Missouri Pacific R. Co. v. Clarendon Boat Oar Co., Inc.*, 257 U. S. 533; *Morris & Co. v. Skandinavia Insurance Co.*, 279 U. S. 405; *American Indemnity Co. v. Detroit Fidelity & Surety Co.* (CCA, 5), 63 Fed. (2d) 395; *Stephens v. Richman & Samuels, Inc.* (CCA, 5), 118 Fed. (2d) 1011; cert. den., 214 U. S. 651.

If the Alabama statutes were construed as petitioner contends, serious constitutional questions would be raised, as the court says in *Chipman, Ltd. v. Thomas B. Jeffery Co., supra.* We submit that due process does forbid the construction petitioner urges. But if we should err in this, the established principles of construction should cause petitioner's contention to be rejected to avoid serious consti-

* This decision was noted with approval in *33 Harv. L. Rev. 701.*

tutional question. However, actually the law of Alabama is clear and precludes the attempt to bring Gas Company into court.

If we should be in error, and if the Alabama law should be deemed to allow the obtaining of jurisdiction over the person of Gas Company in the manner attempted in the instant case, the decision of the court below must still be affirmed unless this court is prepared to extend the rule of the *Neirbo* case on the question of venue. That case does not cover the situation where, as here, the cause of action arose beyond the state, nor where the defendant corporation had withdrawn from the state, nor where the service was not had on a person actually designated by the corporation as its process agent. Cases declining to so extend the *Neirbo* rule are cited in the footnote hereto.*

CONCLUSION

In substance, this is an effort by petitioner, motivated by selfish purposes, to induce this court to write into the laws of Alabama rules not found therein and, this being done, to then broaden the *Neirbo* case sufficiently to enable petitioner to proceed in a court in which the action does not lie under the existing decisions. It is an effort to bring a defendant to trial in the Federal Court when it could not be brought into a state court within the district or state.

There is no conflict, actual or probable, between the decision of the court below and the decision of this court in the *Neirbo* case; and the pertinent local decisions have been given proper application. Petitioner does not claim that the question is one of great public importance.

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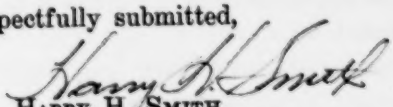
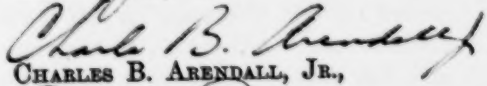
* *Knobloch v. Kellogg Co.* (CCA, 5) 154 Fed. (2d) 45; *North Butte Mining Co. v. Tripp* (CCA, 9) 128 Fed. (2d) 588; *Robinson v. Coos Bay Pulp Corp.* (CCA, 3) 147 Fed. (2d) 512; *Moss v. Atlantic Coast Line R. Co.* (CCA, 2) 149 Fed. (2d) 701; *Lee v. Acme Freight Lines, Inc.* (DC, SD, Ga.) 54 Fed. Supp. 397.

For these reasons the petition should be denied.

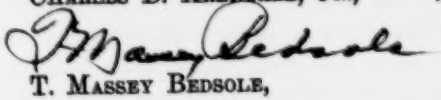
Respectfully submitted,



HARRY H. SMITH,



CHARLES B. ARENDALL, JR.,



T. MASSEY BEDSOLE,

622 First National Bank Building,
Mobile, Alabama.
Counsel for said Respondent.

Of Counsel:
SMITH, HAND, ARENDALL & BEDSOLE,
Mobile, Alabama.

APPENDIX

Section 7209 of the Code of Alabama of 1923 (now Section 192 of Title 10 of the Code of 1940; and formerly Section 3642 of the Code of 1907):

> Foreign corporation must file instrument of writing designating agent and place of business in this state.—Every corporation not organized under the laws of this state shall, before engaging in or transacting any business in this state, file with the secretary of state a certified copy of its articles of incorporation or association and file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this state and an authorized agent or agents residing thereat; and when any such corporation shall amend its articles of incorporation or association, or shall abandon or change its place of business as designated in such instrument, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this state.
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> • • • • •

Section 9426 of the Code of Alabama of 1923 (now supplanted by the Act of July 6, 1940, set out in this Appendix, *infra*); said statute being identical with Section 5306 of the Code of 1907:

> Service on designated agent of foreign corporations; proof of agency.—When a foreign corporation has filed an instrument in writing designating one or more agents in this state as provided by this Code, process issuing against such foreign corporation may be served upon any agent so designated; and the certificate of the secretary of state, or of the auditor, as the case may be, showing such designation, is evidence of the fact of such agency. If the agent designated by such foreign corporation shall die, resign, remove from

the state, or his authority shall cease from any cause, and no other agent shall be designated by such foreign corporation, the service of process issuing against it may be made upon the secretary of state; and the officer serving such process upon the secretary of state must immediately transmit a copy thereof by mail to such corporation at its home office, and state such fact in his return.

* * * * *

Act of July 6, 1940 (General Acts of Alabama, 1939, page 976, approved July 6, 1940; now found in the 1943 supplement to the Code of Alabama of 1940 as Section 192 of Title 7 of said Code):

An Act

To amend Sections 9426 and 9427 of the Code of Alabama.

Be it Enacted by the Legislature of Alabama:

Section 1. Sections 9426 and 9427 of the Code of Alabama be and the same are hereby amended to read as follows: Section 9426. SERVICE ON DESIGNATED AGENT OF FOREIGN CORPORATIONS: PROOF OF AGENCY.—When a foreign corporation has filed an instrument in writing designating one or more agents in this State as provided by this Code, process, pleadings or papers issuing against such foreign corporation, other than in equity, may be served upon any agent, so designated; and the certificate of the Secretary of State or of the Auditor, as the case may be, showing such designation, is evidence of the fact of such agency. In the event such foreign corporation withdraws from this State and ceases to transact business herein, it shall continue to keep and maintain such agent within this State upon whom service of process, pleadings or papers may be made, until the statutes of limitations shall have run against the bringing of action against said corporation. If the agent designated by such foreign corpora-

tion shall die, resign, remove from the State, or his authority shall cease from any cause, and no other agent shall be designated by such foreign corporation, or said corporation shall revoke or fail to maintain in effect the authority of its designated agent after its withdrawal from this State and prior to the time when the statutes of limitations would have run against the causes of action so accruing against it, then in that event such corporation shall by a duly executed instrument filed in the office of the Secretary of State, constitute and appoint the Secretary of State its true and lawful attorney, upon whom all such process, pleadings or papers may be served, and therein shall agree that all such process, pleadings or papers which may be served upon its said attorney, shall be of the same force and validity as if served upon the said corporation, and the authority thereof shall continue in force irrevocably until the statutes of limitations shall have run against the bringing of the action against said corporation, and the same shal be held as due and sufficient service upon such corporation. In the event such corporation shall fail to so constitute and appoint the Secretary of State its true and lawful attorney, upon whom all such process, pleadings or papers may be served, and no other such agent shall have been so designated by such corporation for such purpose, then such corporation shall be deemed to have consented to the Secretary of State being its true and lawful attorney, upon whom all such process, pleadings or papers may be served, until the statutes of limitations shall have run against the bringing of the action against said corporation, and the same shall be held as due and sufficient service upon such corporation. The Secretary of State must immediately transmit by registered mail, return receipt requested, to such foreign corporation at its home office, a copy of such process, pleadings or papers served upon him, retaining the copy of such process, pleadings or papers served upon him along with the return receipt as part of the permanent records of his office.

Section 9427. SERVICE OF PROCESS ON CORPORATION NOT QUALIFIED TO DO BUSINESS IN THE STATE. (Omitted because immaterial here).

Section 2. All laws, or parts of laws inconsistent with or in conflict with the provisions of this Act are, to the extent of such inconsistency or conflict, hereby expressly repealed.

Section 3. This Act shall become effective upon its enactment into law.

Approved July 6, 1940.

* * * * *

Section 25 of Title 7 of the Code of 1940:

Limitation of two years.—An action by representative to recover damages for wrongful act, omission, or negligence, causing the death of the decedent, under sections 119 and 123 of this title must be commenced within two years.

* * * * *

Section 232 of the Constitution of Alabama of 1901:

No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax.

* * * * *

Section 97 of Title 7 of the Code of Alabama of 1940 (Act of 1907):

Enforcement in this state of cause of action arising in another state, when jurisdiction of the defendant can

be obtained in this state.—Whenever, either by common law or the statutes of another state, a cause of action, either upon contract, or in tort, has arisen in such other state against any person or corporation, such cause of action shall be enforcible in the courts of this state, in any county in which jurisdiction of the defendant can be legally obtained in the same manner in which jurisdiction could have been obtained if the cause of action had arisen in this state. (1907, p. 67.)